

1  
2  
3  
4  
5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 LARRY GENE HEGGEM,  
8 Plaintiff,

9 vs.

10  
11 BRANDON KELLY and  
12 JEFF UTTECHT,  
13 Defendants.

No. CV-07-258-LRS

**ORDER DENYING MOTION  
FOR SUMMARY JUDGMENT**

14 **BEFORE THE COURT** is the Plaintiff's Motion For Summary Judgment  
15 (Ct. Rec. 41).

16 Plaintiff asserts an Eighth Amendment claim for excessive force under 42  
17 U.S.C. §1983. He claims that on April 12, 2007, while he was an inmate at the  
18 Washington State Penitentiary (WSP), Correctional Officer Brandon Kelly used an  
19 excessive amount of force upon Plaintiff after escorting the Plaintiff back to his  
20 cell and uncuffing him. An inmate is placed into his cell with handcuffs still on  
21 which are attached to a cuff retainer which the officer continues to hold on to after  
22 the inmate is placed into the cell. The inmate then backs up and places his cuffed  
23 hands into the cuff port to allow the officer to release the handcuffs. Plaintiff  
24 asserts that on April 12, 2007, while this was taking place, Officer Kelly pulled  
25 extremely hard on the cuff retainer (aka "escort rope"), causing injuries to the  
26 Plaintiff.

27 "[W]henver prison officials stand accused of using excessive physical  
28 force in violation of the [Eighth Amendment], the core judicial inquiry is . . .

**ORDER DENYING MOTION  
FOR SUMMARY JUDGMENT- 1**

1 whether force was applied in a good-faith effort to maintain or restore discipline,  
2 or maliciously and sadistically to cause harm.” *Hudson v. McMillian*, 503 U.S. 1,  
3 6-7, 112 S.Ct. 995 (1992). Where prison officials have acted in response to an  
4 immediate disciplinary need, because of the risk of injury to inmates and prison  
5 employees, and because prison officials will not have time to reflect on the nature  
6 of their actions, the “malicious and sadistic standard,” as opposed to the  
7 “deliberate indifference” standard, applies. *Whitley v. Albers*, 475 U.S. 312, 320-  
8 21, 106 S.Ct. 1078 (1986). When determining whether the force is excessive, the  
9 court looks at the “extent of injury . . . , the need for application of force, the  
10 relationship between that need and the amount of force used, the threat  
11 ‘reasonably perceived by the responsible officials,’ and ‘any efforts made to  
12 temper the severity of a forceful response.’” *Hudson*, 503 U.S. at 7, quoting  
13 *Whitley*, 475 U.S. at 321.

14 The purpose of summary judgment is to avoid unnecessary trials when there  
15 is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d  
16 1129 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469 (1975). Under Fed. R.  
17 Civ. P. 56, a party is entitled to summary judgment where the documentary  
18 evidence produced by the parties permits only one conclusion. *Anderson v.*  
19 *Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505 (1986); *Semegen v.*  
20 *Weidner*, 780 F.2d 727, 732 (9th Cir. 1985). Summary judgment is precluded if  
21 there exists a genuine dispute over a fact that might affect the outcome of the suit  
22 under the governing law. *Anderson*, 477 U.S. at 248.

23 At this juncture, the court is compelled to find there remains a triable issue  
24 (a genuine issue of material fact) whether Officer Kelly applied force “maliciously  
25 and sadistically for very purpose of causing harm” to the Plaintiff in violation of  
26 his Eighth Amendment rights. In this case, in addition to the differing accounts of  
27  
28

1 incident from the Plaintiff and Officer Kelly<sup>1</sup>, there is a recorded surveillance  
2 video of the incident. The court intends to review that video later in these  
3 proceedings, perhaps at trial, although it is extremely unlikely that the court would  
4 be able to conclude as a matter of law from that video that there simply is no  
5 dispute that Officer Kelly applied force maliciously or sadistically as opposed  
6 applying it in a good-faith effort to maintain or restore discipline.<sup>2</sup> In ruling on  
7 summary judgment motions, the court is not to resolve conflicting evidence with  
8 respect to disputed material facts, weigh evidence, or make credibility  
9 determinations, all of which are the province of the trier of fact. *T.W. Elec.*  
10 *Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9<sup>th</sup> Cir.

11 ///

12 ///

13 ///

14 ///

---

15  
16 <sup>1</sup> A WSP Interdepartmental Memorandum attached as an exhibit to  
17 Plaintiff's "Memorandum of Law" (Ct. Rec. 42), indicates that Officer Kelly's  
18 version of the incident is that Plaintiff pulled away from the cell door, causing the  
19 officer's right hand, which was holding the cuff retainer, to hit the cuff port with  
20 sufficient force to break the skin on his right thumb under his glove. Kelly  
21 maintains he applied steady pressure on the cuff retainer, whereas Plaintiff asserts  
22 that Kelly yanked on the retainer twice, very fast and hard. In an answer to an  
23 interrogatory from the Plaintiff, Kelly indicated he did not let go of the cuff  
24 retainer because he is responsible for maintaining control of equipment issued to  
25 him and inmates are not allowed to possess such items. (Ex. to Ct. Rec. 51 at p.  
26 13).

27 <sup>2</sup> Plaintiff asks the court to order that his counselor at the Washington State  
28 Reformatory (WSR), Jason Neely, provide a written statement to the court  
describing what he saw on the video. This would not be proper evidence. The  
court will draw its own conclusions about the video, if appropriate. Otherwise, it  
will be up to the trier of fact to determine what the video reveals. Plaintiff's  
"Request For Written Statement" from Jason Neely (Ct. Rec. 56) is **DENIED**.

**ORDER DENYING MOTION  
FOR SUMMARY JUDGMENT- 3**

1 1987).<sup>3</sup> For the all foregoing reasons, Plaintiff's Motion For Summary  
2 Judgment (Ct. Rec. 41) is **DENIED**.

3 **IT IS SO ORDERED.** The District Executive shall forward copies of this  
4 order to the Plaintiff and counsel for the Defendants.

5 **DATED** this 17th of March, 2008.

6 *s/Lonny R. Suko*

7 \_\_\_\_\_  
8 LONNY R. SUKO  
9 United States District Judge  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

25 <sup>3</sup> Plaintiff has also named WSP Superintendent Uttecht as a Defendant.  
26 Supervisory liability arises only upon a showing of "personal participation." A  
27 supervisor is liable for the constitutional violations of subordinates only if the  
28 supervisor participated in or directed the violations, or knew of the violations and  
failed to act to prevent them. *Taylor v. List*, 880 F.2d 1040, 1045 (9<sup>th</sup> Cir. 1989).

**ORDER DENYING MOTION  
FOR SUMMARY JUDGMENT- 4**